



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCCRC NO. 31 OF 2015**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**COLLINS OTIENO OJWANG ..... ACCUSED**

**JUDGMENT**

The accused is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on 22nd May 2015 at Nyalenda area, Kisumu East Sub-County within Kisumu, jointly with others not before Court he murdered **Sospeter Obuya Awuor**.

He pleaded not guilty to the charge.

At the trial the prosecution called five witnesses and the sum total of their evidence is that on the material day the deceased together with his brothers Allan Otieno Obiero (PW1) and Edwin Okumu (PW2) went to their brother's home to mourn their sister in-law Beatrice. It was at night and there were other mourners some inside the house and others outside. There seemed to be dispute between them and their in-laws in regard to their sister in-law's place of burial so when the deceased's phone rung and he went behind the house to answer it he was attacked. According to Allan (PW1) and Edwin (PW2) they identified the attackers as their in-laws Elly, Collins Salias Sadat (the accused in this case) and Boyi. Boyi was armed with a sword which he used to stab the deceased in the abdomen. His brother Collins, the accused, slashed the deceased on the neck with a panga after which they fled. According to these two witnesses there was electricity where the attack occurred and they were able to identify the assailants as they knew them. The deceased died on 27th May 2015 at the District Hospital. His wife Maureen Adhiambo (PW3) testified that before he died he told her that those who had attacked him were Sadat, Elly and Boyi. Gerald Njuguna (PW5) a Police Constable attached to Kisumu Police Station also alleges to have recorded a statement from the deceased in which he named his attackers as Boyi, Sadat, Elly and others. That statement was produced as an exhibit EXB.P7. The accused was arrested on the same night.

The post mortem report was produced by Dr. Patrick Omondi (PW4) of Kisumu County Hospital. He produced it on behalf of his colleague Dr. Amollo Robert who has since resigned. The cause of death was opined to be "lacerated spleen with excessive bleeding due to stab wounds."

The accused testified that before his incarceration he used to wash cars at Nyalenda in Kisumu and that on 21st May 2015 he had gone to mourn his sister Beatrice Adhiambo at her house. There was a fund raising with music and there were many people including a women's group which also had a fund raiser. When they finished at 9PM the chairlady requested him to escort one of the women to the road to catch a motor cycle to her home. He agreed and escorted the woman with his friends Collins, Paul and Tony. After that they went to a bar. After 30 or 40 minutes they returned to his sister's house only to find things strewn all over. Some people who had locked themselves in the house told him that some people had

assailed them for allegedly taking away their wife. He started picking the things scattered outside but soon he heard people asking where Boyi was and whether his (accused's) friends had been brought there to steal their wife. It was then that he fled. When he went back clam had returned. He told the Court that the next day they had to get the protection of the Assistant Chief and four police officers to bury their sister. He denied that on that night he was armed. He stated that the deceased in this case was his in-law and they differed because the in-laws wanted to take away his sister's household goods yet she did not have a house where they wanted to take them. He conceded that Elly was his uncle, that Boyi was his brother and that his own nickname was Sadat. He contended that Allan (PW1) and Edwin (PW2) framed him because he refused to allow them to take his niece, the daughter of the deceased. He called one witness George Yogo Otieno (DW1) who while conceding that a person died at the funeral after being stabbed, categorically stated that the accused was not one of the assailants. He testified that the deceased started a commotion and Boyi got hold of him. They fell down together and in the process the said Boyi stabbed him with a knife. After that Boyi fled and went into hiding. He stated that the accused came back to the home drunk and started asking for food.

In summing up Mr. Indimuli, Advocate for the Accused, submitted that Allan (PW1) gave false testimony as there was evidence from his brother PW2 that he fled when the scuffle started; that, therefore, he could not have witnessed what transpired. He also submitted that the allegation that the accused slashed the deceased on the neck with a panga was discounted by the Doctor (PW5) and the post mortem report which ruled out an injury on the neck and which also stated that the laceration on the forehead could not have been inflicted with a panga. He also took issue with the evidence of the deceased's wife (PW3) which he submitted contradicted that of PW1 and PW2 regarding the time the incident occurred. As for the evidence of the investigating officer he stated that it contradicted that of the star witnesses (PW1 and PW2) in that whereas he stated the deceased was stabbed by Elly he never established whether Boyi had a weapon or if he did which part of the deceased's body he wounded.

He urged this Court to resolve the contradictions in the accused's favour and acquit him. He further submitted that the charge sheet was at variance with the evidence in regard to the date of the alleged offence. He contended that the charge was incurably defective and for that reason the accused should be acquitted.

Mr. Muia, Prosecution Counsel submitted that the accused did not rebut the evidence of the prosecution witnesses and hence tendered no defence. He urged this Court to find that the deceased's statement taken by PC Gerald Njuguna (PW5) is a dying declaration. He submitted that it is the accused who inflicted severe injuries to the deceased leading to his death, that he was properly identified by three witnesses who included the deceased and that the motive of the attack was a family dispute. He contended that the prosecution has proved its case beyond reasonable doubt to sustain a conviction against the accused.

The points for determination are whether the death of the deceased was a result of an unlawful act of the accused and if so whether it was of malice aforethought.

The post mortem report produced by Dr. Patrick Omondi (PW4) indicates that the deceased had multiple stab wounds on the right lumbar, the hypochondrium, head and back. The Doctor who performed the post mortem opined the cause of death was a lacerated spleen with excessive bleeding due to stab wounds. This is consistent with the evidence of Allan (PW1) and Edwin Okumu (PW2) that the deceased was stabbed twice in the abdomen by Boyi. It is also consistent with evidence that he was slashed on the head with a panga as it states that he had stab wounds on the head. The deceased had gone to the back of the house to take a call when he was attacked. There is no evidence that he provoked the attackers. Clearly therefore the death of the deceased was the result of an unlawful act. According to PW1 and PW2 the person who inflicted the stab wounds in the abdomen was Boyi, a brother of the accused. The witnesses also claim to have seen the accused cut the deceased on the head with a panga.

The accused and his witness disputed this and contended that he was not at the scene when the attack on the deceased occurred. I have evaluated the evidence carefully and I am satisfied that the accused person was at the scene at all material times and that he actively participated in the attack on the deceased. The two

witnesses PW1 and PW2 referred to him as Sadat a nickname he admitted. They also testified that they knew him well which again he admits. They were in-laws and were well known to each other. They also testified that the scene was well illuminated as there was electricity – it was at the home of their late sister. This therefore was evidence of recognition. I am satisfied that the prevailing circumstances were conducive to a positive identification and that these witnesses were truthful and reliable. This is in contrast to the defence witness whose evidence sharply contradicted that of the accused person. The accused in his testimony stated that he left the home to escort one of the ladies who had come to mourn with them and that when he returned things were strewn all over. He testified that he was sober and that he came back with his friends Collins, Paul and Tony. On the other hand George Yogo, the defence witness stated that the accused was drunk when he came back and that he was alone. This contradiction renders the defence of the accused person unreliable. The Court cannot tell who to trust between the accused person and his witness. The evidence of the prosecution witnesses remains unshaken and I find that the accused together with his brother Boyi and uncle Elly inflicted the injuries which caused the death of the deceased person. As I have already stated there is credible evidence that when he was attacked the deceased had stepped out to go answer his phone at the back of the house. There is no evidence that he provoked the attackers and the assault was therefore unlawful.

The investigating officer (PW5) introduced a statement allegedly taken from the deceased before he died and contended that the same was a dying declaration. I beg to differ and wish to point out that I have not taken it into consideration in arriving at my finding. Whereas that statement is said to have been signed by the deceased it was not written in his hand but by the investigating officer. When he was cross-examined by Counsel for the accused person he admitted that the deceased had said that the only person who knew the culprits was his brother. If the deceased did not know the

culprits by name how did the names in the statements end up there? They must have been included by the investigating officer himself and that statement cannot be a dying declaration. Its veracity is doubtful.

What of malice aforethought? Section 203 of the Penal Code states -

**“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

I have already found that the accused caused the death of the deceased by an unlawful act. I further find that it was of malice aforethought. The accused slashed the deceased with a panga on the head and whereas that blow is not what is stated to be the fatal blow he took part in the killing. The fact that he had armed himself with a panga and joined his kin in assaulting the deceased is proof that they intended to kill or do him grievous harm. The accused told this Court that the deceased and his brothers had wanted to cart away the belongings of their sister in-law who had died and who they had gone to mourn. This was no justification to take away someone's life. This was a calculated and well planned attack and it is evidenced by the place and manner in which it was executed. I am satisfied that the charge against the accused person has been proved beyond reasonable doubt. The defect in this charge sheet regarding the date the offence was committed is not fatal as the same is curable under Section 214(2) of the Criminal Procedure Code. I find the accused guilty of Murder Contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

**Signed, dated and delivered at Kisumu this 31st day of May 2017**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

Muia for the state

Mr. Indimuli for the accused person

Court Assistant – Serah Sidera

Accused Person

MR. INDIMULI: The accused person is remorseful. He is a first offender and seeks the assistance of the Court.

**E. N. MAINA**

**JUDGE**

MR. MUIA: Treat him as a first offender.

**E. N. MAINA**

**JUDGE**

COURT: Plea in mitigation noted. However as of now there is only one sentence for this offence. Accordingly the accused is sentenced to death.

Right of Appeal explained.

**E. N. MAINA**

**JUDGE**

**31/5/2017**